

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONNIE BROWN
: CIVIL ACTION

v.

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MARTIN DRAGOVICH, et al.
: NO. 96-5549

MEMORANDUM

VanArtsdalen, S.J.

Petitioner Ronnie Brown, a state prisoner currently incarcerated at the State Correctional Institution at Frackville, has filed a pro se petition for a writ of habeas corpus. This court referred the petition to the Honorable Magistrate Judge Thomas J. Rueter for a Report and Recommendation. Petitioner has filed objections, and for the reasons set forth below, I will overrule those objections and adopt the Magistrate's Report and Recommendation.

Factual and Procedural Background

Petitioner was convicted in 1985 of two counts of robbery, theft by unlawful taking or disposition, possession of an instrument of crime, possession of a firearm without a license, and criminal conspiracy. On direct appeal, the Pennsylvania Superior Court upheld petitioner's conviction and sentence, and the Supreme Court subsequently denied allocatur.

Thereafter, petitioner sought relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), alleging ineffective assistance of trial counsel on the following grounds: (1) failure to raise post-trial issues relating to petitioner's confession; (2) failure to request a jury instruction on the alibi defense; (3) failure to request a jury instruction on identification testimony; (4) failure to present an alibi defense; and (5) failure to request on direct appeal that the Superior Court review the discretionary aspects of petitioner's sentence. The court appointed counsel for petitioner, held an evidentiary hearing, and denied the petition.

On appeal to the Superior Court, petitioner pursued only two claims of ineffective assistance based on trial counsel's failure to (1) challenge petitioner's confession and (2) properly appeal petitioner's sentence to the Superior Court on direct appeal. The Superior Court affirmed the lower court decision, and the Pennsylvania Supreme Court again denied the petition for allocatur.

Petitioner subsequently filed a second state petition for collateral relief, asserting that: (1) counsel was ineffective by failing to object to petitioner's submission to a polygraph test; (2) counsel was ineffective by failing to request a jury fairly representing petitioner's race; (3) the court erred by compelling the public defender to represent both petitioner and his co-defendant; (4) counsel was ineffective by failing to raise the issue of a jury poll; (5) the court erred by failing to suppress petitioner's statement; (6) counsel was ineffective by

failing to cross-examine a witness; and (7) counsel was ineffective by failing to appeal the denial of a motion for a mistrial. Because each of these issues had either been waived by petitioner's failure to raise them in his first PCRA petition or were barred because they had been previously litigated, the court denied the petition. Again, the Superior Court affirmed and the Supreme Court denied the allocatur petition as untimely.

Petitioner thereafter filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner asserts that (1) his sentence violates both Pennsylvania law and the Double Jeopardy provision of the Fifth Amendment to the United States Constitution and (2) his trial counsel rendered ineffective assistance by failing to pursue an alibi defense, by failing to request a jury instruction on the alibi defense, and by failing to challenge the prosecution's use of race-based peremptory strikes.

The Magistrate Judge's Report and Recommendation concludes that petitioner has procedurally defaulted on his claims relating to ineffective assistance of counsel, and that, although the double jeopardy claim is reviewable, it is without merit. Petitioner filed objections to the Magistrate's determination that the ineffective assistance claims were unreviewable due to petitioner's procedural default.

Legal Standard

Upon a petitioner's objection to a magistrate judge's report and recommendation, a district court "shall make a de novo

determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by a magistrate." 28 U.S.C. § 636(b)(1)(C).

Discussion

The independent and adequate state ground doctrine generally operates to bar federal habeas review of claims on which a petitioner has procedurally defaulted in the state courts. See Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). A state court's refusal to address a prisoner's claims because of his failure to comply with state procedural requirements constitutes an independent and adequate state ground for the judgment that precludes federal review. See id.; Wainwright v. Sykes, 433 U.S. 72, 81 (1977). Upon a finding of procedural default, a federal court may entertain a petition for a writ of habeas corpus only if the petitioner can demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

Petitioner's claims relating to ineffective assistance of counsel have clearly been procedurally defaulted. The allegation that trial counsel rendered ineffective assistance by failing to present an alibi defense and by failing to request jury instruction on the alibi defense was raised in petitioner's

first PCRA petition. Petitioner waived those arguments, however, by abandoning them on appeal. Furthermore, by failing to raise the issue in his first PCRA petition, petitioner procedurally defaulted on his ineffective assistance claim stemming from trial counsel's failure to challenge the use of race-based peremptory strikes. See Commonwealth v. Brown, No. 85-3552, slip op. at 4 (C.P. Delaware Nov. 28, 1994). Accordingly, this court can exercise review of these claims only upon a showing of cause and prejudice or a fundamental miscarriage of justice.

Petitioner argues that the ineffective assistance of his post conviction counsel, as distinguished from the ineffective assistance of trial counsel constituting the basis of the underlying claims, establishes sufficient cause to excuse the procedural default. "The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986).

The Supreme Court, in Coleman, makes clear that only attorney error that rises to the level of constitutionally ineffective assistance of counsel constitutes "cause." 501 U.S. at 753-54. An error that violates a petitioner's constitutional right to counsel is seen as an external factor that is imputed to the state, which must therefore bear the risk of any resulting default. Attorney error that does not violate any constitutional right, however, is not external to the defense. "Attorney

ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'" Id. at 753 (quoting Carrier, 477 U.S. at 488). It is not the gravity of the error, but the existence of a violation of the constitutional right to counsel, that determines whether attorney error will be sufficient cause to overcome a procedural default. Coleman, 501 U.S. at 754.

It is well established that petitioner has no constitutional right to effective assistance of counsel during post-conviction, collateral proceedings. See id. at 752; Pennsylvania v. Finley, 481 U.S. 551 (1987). In the absence of any such right, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752. Accordingly, any error by petitioner's post-conviction counsel cannot constitute cause to overcome his procedural default. See Hull v. Freeman, 991 F.2d 86, 91 (3d Cir. 1993) ("Under Coleman, ineffective assistance of post-conviction counsel cannot constitute 'cause' because the Sixth Amendment does not entitle a defendant to post-conviction counsel"); Thomas v. Love, 1995 WL 563827 (E.D. Pa.).¹

1. Although post-conviction attorney error does not constitute cause to overcome procedural default under federal habeas corpus jurisprudence, Hull indicates that petitioner may still petition the state courts waive his procedural default. If the state courts waive the default and consider the merits of petitioner's claims, petitioner could then obtain federal habeas review of that state judgment. 991 F.2d at 92-93.

Even if the cause and prejudice exception does not apply, petitioner asserts that a fundamental miscarriage of justice will occur if this court does not entertain his petition. It is clear, however, that a fundamental miscarriage of justice occurs only "'in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, (1995) (quoting Carrier, 477 U.S. at 496). Beyond the bare assertion that he is innocent of the crimes of which he was convicted, petitioner has made no showing of actual innocence. Accordingly, federal habeas review of petitioner's ineffective assistance claims is barred by his procedural default.

The Magistrate Judge did address petitioner's only remaining claim -- that his sentence violates Pennsylvania law and the double jeopardy provisions of the Fifth Amendment to the United States Constitution -- and concluded that petitioner's consecutive terms of imprisonment satisfy the requirements of both Pennsylvania law and the double jeopardy provisions. Petitioner has not objected to that determination, and, upon review, I will adopt the Magistrate's Report and Recommendation.

An appropriate order follows.

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Order

For the reasons set forth in the accompanying memorandum, and upon review of the Report and Recommendation of Magistrate Judge Thomas J. Rueter, IT IS ORDERED as follows:

- (1) the Report and Recommendation are APPROVED and ADOPTED;
- (2) petitioner's objections are OVERRULED;
- (3) the petition for writ of habeas corpus is DENIED without an evidentiary hearing;
- (4) a certificate of appealability SHALL NOT be granted.

BY THE COURT:

Donald W. VanArtsdalen, S.J.

June 16, 1997

